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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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ANNETTE L. GERHARDT,
as Guardian ad Litem
for HEATHER JO KRUEGER,

Petitioner,

v.

ESTATE OF ARLEN LEE MOORE,

Respondent.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

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# BRIEF OF AMICUS CURIAE STATE OF WISCONSIN

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## QUESTION PRESENTED

Is a child denied equal protection of the laws and due process of law by a state court decision that bars her from seeking ongoing support from her natural father because her mother entered into a lump-sum child support settlement pursuant to a state statute that permitted such settlements only if the child is illegitimate?

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# BRIEF OF AMICUS CURIAE
# STATE OF WISCONSIN

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## INTEREST OF AMICUS CURIAE
## STATE OF WISCONSIN

Section 46.25(1) of the Wisconsin Statutes creates a "child and spousal support and establishment of paternity and medical liability support program" in the Wisconsin Department of Health and

Social Services (hereafter "department"). The purpose of this program, among other things, is to establish paternity when possible and to enforce support obligations owed by parents to their children. To accomplish the objectives of this program and of other public assistance programs, county and state agencies are directed to cooperate with one another to implement a child and spousal support and paternity establishment program in accordance with state and federal laws, regulations and rules (Amicus App. 2).

(Section 46.25 is reprinted in full in the appendix to this brief which is hereafter designated (Amicus App. ____.) All other appendix references designated as (App. _____) refer to the appendix to the Petition for Writ of Certiorari.)

The State of Wisconsin through the Department of Health and Social Services, Office of Child Support Enforcement, may represent the state or any individual in any action to establish paternity or to establish or enforce a support obligation under section 46.25(7). The department may delegate its authority to so represent the state or any individual to the district attorney or corporation counsel. Under subsection (9) the department also is required to adopt and publish a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents.

Under sec. 46.25, Wis. Stats., and other related provisions, the department has an oversight responsibility within the child support program to fairly

insure the protection of the interests of all parties, including an absent party such as a child whose interests were not represented by any party to an earlier agreement. Uniform enforcement of the child support program traditionally has required similar treatment of, and rights accorded to, marital and nonmarital children. It is the department's statutory duty, in cooperation with other state and county agencies, to assure access to the courts for resolution of child support disputes.

## ARGUMENT

I. A CHILD IS DENIED EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW BY A STATE COURT DECISION THAT BARS HER FROM SEEKING ONGOING SUPPORT FROM HER NATURAL FATHER BECAUSE HER MOTHER ENTERED INTO A LUMP-SUM CHILD SUPPORT SETTLEMENT PURSUANT TO A STATE STATUTE THAT PERMITTED SUCH SETTLEMENTS ONLY IF THE CHILD IS ILLEGITIMATE.

A. Any agreement or stipulation by a parent which prevents the trial court from reviewing support agreements for fairness and adequacy before approving them, and after judgment from time to time, revising and altering such judgments respecting the amount of child support to be paid, are invalid under Wisconsin law.

In distinguishing this case from In re Paternity of B.W.S., 131 Wis. 2d 301, 388 N.W.2d 615 (1986), the Court stated below that, unlike Wisconsin law, the

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"Michigan statutes and case law expressly provide that settlement agreements are binding only if the circuit court determines that the agreement makes adequate provision for the support and education of the child" (App. 9a-10a).

However, the Court has stated in several cases that the trial court has an independent obligation to review stipulations related to support for fairness. Helmbrecht v. St. Paul Fire Ins. Co., 122 Wis. 2d 94, 104 n.2, 362 N.W.2d 118 (1985); Conrad v. Conrad, 92 Wis. 2d 407, 415, 416, 284 N.W.2d 674 (1979); Leighton v. Leighton, 81 Wis. 2d 620, 629, 261 N.W.2d 457 (1978); Schmitz v. Schmitz, 70 Wis. 2d 882, 886-88, 236 N.W.2d 657 (1975); Ray v. Ray, 57 Wis. 2d 77, 84, 203 N.W.2d 724 (1973); Bliwas v. Bliwas, 47 Wis. 2d 635, 639, 178 N.W.2d 35

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(1970); and Miner v. Miner, 10 Wis. 2d 438, 443, 103 N.W.2d 4 (1960).

At the time the support agreement in this case was entered, the trial court was also subject to sec. 52.45, Wis. Stats. (1967) which provided that the relevant statutes "shall be so interpreted and construed as to effectuate the protection and welfare of the child involved in any proceedings hereunder."

The Court acknowledged in its opinion that "[t]he child's interest in receiving support, however, was not in which party provided support, but only that adequate support was provided" (App. 7a-8a). The court further stated that when a stipulation for support received Court approval, "then the child's interest has been adequately protected pursuant to the statute" (App. 8a).

In addition, it is generally recognized that where a divorce court has ordered one of the parties to provide for the support and maintenance of the children of the marriage, that allowance may, at any time after the decree has been rendered, be varied or modified on the application of either party. Annot., 61 A.L.R.3d 663 (1975), citing 24 Am. Jur. 2d Divorce and Separation § 844 (1984). For example, sec. 767.32, Wis. Stats., requires the court, upon a finding of a factual basis, to revise and alter judgments upon request.

The state contends that the child's interest is in the continued adequacy of the support and that this interest is to be protected by the trial court until the child reaches adulthood. The state further contends that the trial court's approval of the agreement in this case

cannot relieve the trial court of its duty to review the agreement for adequacy as circumstances change to modify that amount to meet the child's changed needs.

B. A child whose interests were not represented by any party to the agreement cannot have her rights derogated by the agreement.

1. There is no evidence that the mother represented the child's interests in negotiating this agreement.

The Court concluded that because the mother was a party and because her interests incorporated those of her child, there was an identity of interests between the mother and child. However, the Court did not acknowledge that pursuant to sec. 52.29, Wis. Stats. (1967) the district attorney had full

authority to enter into a support agreement with the father without the mother's consent and had full authority to decide whether to commence an action at all, State ex rel. Smith v. Chicks, 70 Wis. 2d 833, 235 N.W.2d 694 (1975).

Since this case proceeded on a Motion to Dismiss, there is no information in the record which would inform the Court whether this mother was formally or informally coerced into this agreement in order to persuade the district attorney to commence the action or to ensure that she received any support at all. However, since she had received public assistance during her pregnancy, she had no right to either commence the action or to pursue her own support action without the approval of the district attorney, secs. 52.22 and 52.29, Wis. Stats. (1967). Thus, to

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conclude that she was free to negotiate or litigate her child's rights to child support is simply unsupported by the relevant statutes or the record.

Absent this ability to independently negotiate or litigate the issue of child support, the child's interest in adequate child support could not be represented by the mother.

2. The district attorney did not represent the interests of the mother or child.

The Court further indicated that the state's interest in the level of child support is represented by the district attorney (App. 7a-8a). There were no facts of record as to the interests actually represented by the district attorney in this case.

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However, in 1970, the county paid the medical expenses. The state and federal governments shared most of the liability for future support of the child in the form of Aid to Families with Dependent Children. Thus, the district attorney's immediate concern was the reimbursement to his employer, the county, for the medical expenses of the child's birth and not the future financial support of the child. This is reflected in the settlement here, which fully covered the county's expenses and waived the child's future support.

In addition, the district attorney had the concern of saving time and money for the county by settling cases. This immediate concern is unrelated to the adequacy of the child's future support. Also, paternity cases had such low priority for district attorneys during

this time that such actions were not even listed separately on the official statement of the district attorney duties in sec. 59.47, Wis. Stats. (1967).

The district attorney had no obligation to represent the mother in this proceeding, even though she had no right to obtain private counsel to prosecute the case and even though any support agreement could be dictated by the district attorney, without agreement of the mother. For the same reasons that the Court held that the district attorney did not represent the interests of the child in deciding whether to bring a paternity action, it is the state's contention that the district attorney did not represent the interests of the child in seeing to it that they receive adequate support.

Given this multitude of conflicting interests and disincentives affecting the role of the district attorney, it is the state's contention that the district attorney did not have the authority to waive the child's right to support from her parent for the following eighteen years.

C. The numerous distinctions between marital and nonmarital children approved by the Court are not substantially related to any legitimate state purpose and, as such, violate the provisions of the Equal Protection Clause of the United States Constitution.

1. Lump-sum child support payments, which have always been prohibited for marital children, are in excess of what is needed to obtain an admission of paternity.

The lump-sum child support payment authorized in chapter 52, Wis. Stats. (1967) was in effect until 1981. Thus, under the court's decision, nonmarital children, now ages six through eighteen, have no right to receive child support from their fathers if the district attorney and/or their mothers entered

into agreements under this statute. There is no equivalent group of marital children.

Although there may have been public policy grounds for permitting lump-sum settlement agreements in those cases where paternity was difficult to prove, there is no public policy which would support the use of lump-sum agreements in those cases where paternity can be proven, or where, as in the present case, the putative father admits paternity. A settlement regarding uncertain paternity stands on a very different footing than does a contractual attempt to compromise or waive parental support obligations. Harry D. Krause, Child Support in America: The Legal Perspective, at 176-77 (1981). In those cases the uncertainty stems from the uncertainty of being able to establish paternity, and

not from uncertainty as to what support is owed the child.

The court described the lump-sum payment alternative as simply another way of paying child support. The actual result, however, is that it is another way of not paying child support. It is this actual result which has led the legislature and courts to prohibit parents from waiving child support rights for marital children. The lump-sum method of payment deprives the trial court of authority to act in the children's best interest.

Distinctions between marital and nonmarital children must be substantially related to permissible state interests. Lalli v. Lalli, 439 U.S. 259, 275-76 (1978). Thus, there must be more than a reactional relationship between the

distinction and the state's legitimate purpose.

Further, the Equal Protection Clause of the United States Constitution requires that a statute placing exceptional burdens on nonmarital children in the furtherance of proper state objectives must be more carefully tuned to alternative considerations and must not reach in excess of its justifiable purposes. Trimble v. Gordon, 430 U.S. 762, 772 (1977).

If the "legitimate state interest" being furthered by the ability to "buy out" of a child support obligation cheaply is the district attorney's ability to obtain an admission of paternity, the questions to ask are, (1) does this alternative accomplish this purpose? and (2) is the reach of this

statute in excess of what is necessary to achieve this purpose?

It can be argued that this "buy out" option may, in some cases, accomplish this purpose. However, there is no evidence in this record to indicate that it was necessary to obtain the admission in this case. Further, the fact that this option was eliminated in 1981 indicates that lump-sum payments are not necessary to obtain paternity admissions.

The more important concern, however, is whether the district attorney's need to plea bargain the issue of paternity justifies a total waiver of future child support, regardless of the child's future needs, the future need for public assistance or the father's ability to pay. The legislatively authorized total waiver of support, which the state court says does not have to be "adequate," is

far in excess of what is necessary to achieve this purpose. As a practical matter, when an admission of paternity is obtained in this manner, the benefits to the child are so minimal, that the admission of paternity has almost no value, except to the county which has its medical costs fully covered.

At least two ironies from this disparate treatment. First, the state's interest in keeping children off of public assistance is totally defeated in the name of the "state's interest." Second, the unmarried father's rights remain fully protected after such an agreement, Stanley v. Illinois, 405 U.S. 645, 658 (1972), while the child has lost all right to require that parent to provide support. Thus, the father may subsequently assert visitation and custody rights and even request support

from the mother who was forced to waive future child support in exchange for an admission of paternity.

Not only does the court's decision create a class of nonmarital children, now ages six through eighteen, who are totally deprived of an ability to receive child support from fathers who have the ability to pay, but it allows the Legislature to create future classes of disadvantaged nonmarital children. It is the state's contention that the sweep of such legislation, which adversely affects only nonmarital children, is without justification.

2. A nonmarital child's inability to commence a separate action for child support following the entry of a lump-sum settlement agreement bears no relationship to any legitimate state interest.

If a marital child had commenced a separate paternity action under sec. 767.02(1)(f), Wis. Stats., under the same circumstances, where no child support had been paid because the mother had waived future support, this action could not have been dismissed.

It is difficult to identify the legitimate state purpose here, since paternity would have already been adjudicated, and since in both marital and nonmarital families, parents would be obligated to provide child support until age eighteen.

D. Denial of future support for non-marital children has far reaching implications for children in Wisconsin and the nation.

As noted earlier, there is not a state in the nation that does not permit prospective modification of support orders. 61 A.L.R.3d at 663. The decision in this case violates this general principle of law which has been held to extend even to those cases involving marital children where the support order was based on an agreement between the parties. Poehnelt v. Poehnelt, 94 Wis. 2d 640, 289 N.W.2d 296 (1980).

The implications of this decision are especially far reaching in light of the fact that fifteen states have adopted the provisions of the Uniform Parentage Act which permits the entry of lump sum

orders in lieu of periodic payments of support. Unif. Parentage Act, § 15(d), 9B U.L.A. 324 (1987). In addition, many states have enacted provisions similarly to the Uniform Parentage Act without adopting the Act itself.

The number of nonmarital children who could potentially be impacted by a decision of foreclosing children subject to such agreements from obtaining future support is significant. According to the U.S. Census Bureau, births to unmarried women increased by almost 60% between 1975 and 1982. During this eight year period, a total of 4.6 million children were born out of wedlock. Ann Nichols-Casebolt, Paternity Adjudication: In the Best Interest of the Out-of-Wedlock Child (1988), citing Annual Statistical Abstract of the United States, U.S. Bureau of the Census, 1986. This number

accounts for almost 20% of all births during the time. Id. at 1.

In Wisconsin alone, birth certificate records indicate that over 14,000 children were born to single women in just twenty-two of Wisconsin's seventy-two counties over the two year period from 1981-1982. Sandra K. Danzinger, Ann Nichols-Casebolt, Child Support for Children Born Outside of Marriage: An Analysis of Paternity Cases, 8 (November 1987). The Court's attention is directed to Amicus App. 1, a table presenting data on the disposition of those births. The data indicates that by 1985 only 9.5% of those children had either been adopted or legitimated, leaving over 90% child support eligible.

If the state court's decision stands, the thousands of nonmarital children whose future support rights were

sold for a few dollars will be relegated to a second class financial status. Those children who have successfully obtained a court review and revision of judgment will have their orders vacated; those with actions pending will have them dismissed.

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## CONCLUSION

Based on the arguments presented here, the state urges the Court to grant a writ of certiorari and review the decision of the Wisconsin Supreme Court.

Dated this ___ day of January, 1988.

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# APPENDIX

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SECTION 46.25, WISCONSIN STATUTES . . . . . 2-7

Table 1

Disposition of 1981-82 Births to Unmarried Women by 1985, for Selected Wisconsin Counties

| | Total in Group | Percent of all births | Percent of those Potentially Eligible for Child Support |
|---|---|---|---|
| 1. Total Births | 14,526 | 100% | -- |
| 2. Adoptions | 432 | 3.0 | not eligible |
| 3. Legitimations via marriage | 353 | 2.4 | not eligible |
| 4. Adoptions or Legitimations[1] | 598 | 4.1 | not eligible |
| Total potentially eligible for child support[2] | 13,143 | 90.5 | 100% |
| 5. Affidavit of father's name | 3,067 | 21.3 | 23.5 |
| Paternity adjudications | | | |
| 6. Birth records | 1,870 | 12.9 | 14.2 |
| 7. Court records[3] | 3,320 | 22.9 | 25.3 |
| Remainder without Father identified; not eligible for CS by 1985 | | | |
| 8. Birth records | 8,186 | 56.3 | 62.3 |
| 9. Court records[3] | 6,735 | 46.3 | 51.3 |

Source: Wisconsin Division of Health, Section of Vital Statistics and court record information.

Section 46.25, Wisconsin Statutes:

(1) There is created a child and spousal support and establishment of paternity and medical liability support program in the department. The purpose of this program is to establish paternity when possible, to enforce support obligations owed by parents to their children and maintenance obligations owed to spouses or former spouses with whom the children reside, to locate persons who are alleged to have taken their child in violation of s. 946.71 or 946.715 or of similar laws in other states, and to locate and value property of any person having a support duty. To accomplish the objectives of this program and of other assistance programs under ch. 49, county and state agencies will cooperate with one another to implement a child and spousal support and paternity establishment program in accordance with state and federal laws, regulations and rules and to assure proper distribution of benefits of all assistance programs authorized under ch. 49.

(2) The department shall constitute the state location service which shall assist in locating parents who have deserted their children and other persons liable for support of dependents or persons who are alleged to have taken their child in violation of s. 946.71 or 946.715 or of similar laws in another state, and in locating and valuing property of any person having a support duty.

(2m) The department may request from any person any information it determines

appropriate and necessary for the administration of this section, ss. 49.19, 49.46 and 49.47 and programs carrying out the purposes of 7 USC 2011 to 2029. Any person in this state shall provide this information within 7 days after receiving a request under this subsection. The department or the county child and spousal support agency may disclose information obtained under this subsection only in the administration of this section, ss. 49.19, 49.46 and 49.47 and programs carrying out the purposes of 7 USC 2011 to 2029.

(3) The department, acting as a state location service, shall furnish all services under sub. (2) to any similarly appointed agency of another state which by its laws is authorized to furnish such services to this state or its agencies.

(4) Except as provided in this section, no person may use or disclose information obtained by the state location service. Any person violating this subsection may be fined not less than $25 nor more than $500 or imprisoned for not more than one year in the county jail or both.

(6) The department shall establish, pursuant to federal and state laws, rules and regulations, a uniform system of fees for services provided under this section to individuals not receiving aid under s. 49.19 or 49.47. The system of fees may take into account an individual's ability to pay. Any fee paid and collected under this subsection may be retained by the county providing the service except for

the fee specified in 42 USC 653 (e) (2) for federal parent locator services.

(7) The department may represent the state or any individual in any action to establish paternity or to establish or enforce a support or maintenance obligation. The department may delegate its authority to represent the state or any individual in any action to establish paternity or to establish or enforce a support or maintenance obligation under this section to the district attorney, or corporation counsel when authorized by county board resolution, pursuant to a contract entered into under s. 59.07 (97). The department shall ensure that any such contract is for an amount reasonable and necessary to assure quality service. The department may, by such a contract, authorize a county to contract with any attorney, collection agency or other person to collect unpaid child support or maintenance. If a county fails to fully implement the programs under s. 59.07 (97), the department may implement them and may contract with any appropriate person to obtain necessary services. The department shall establish a formula for disbursing funds appropriated under s. 20.435 (4) (p) to carry out a contract under this subsection.

(7m) The department may contract with or employ a collection agency, attorney or other person to enforce a support obligation of a parent residing outside this state, or to appear in an action in federal court to enforce such an obligation, or both. To pay for the department's administrative costs of

implementing this subsection, the department may charge a fee to counties, retain up to 50% of any incentive payment made to this state under 42 USC 658 for a collection under this subsection and retain 30% of this state's share of a collection made under this subsection on behalf of a recipient of aid to families with dependent children.

(8) The department may charge counties seeking collection of child and spousal support for any administrative costs it incurs in providing services related to the federal parent locator service under 42 USC 653, the interception of unemployment compensation under 42 USC 654 or the withholding of state and federal income tax refunds under s. 46.255 and 42 USC 664.

(9) The department:

(a) Shall adopt and publish a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents.

(b) Shall establish guidelines for courts to consider in determining child support under ss. 767.25 (1m) and 767.51 (5), and shall submit the guidelines to any appropriate standing committee of the legislature for review prior to publication.

(c) Shall develop cost-of-living indices and earnings indices for courts to consider in ordering adjustments in child support under s. 767.33 (1).

(d) May contract with any clerk of court for the department to receive and disburse court-ordered child support payments and to record all such payments and arrearages in payments if the court or clerk of court so requests.

(10)(a) The department shall study the relationship between immediate income withholding and increased collection of child support obligations. With respect to this study, the department may:

1. Enter into written agreements with counties to require the use of immediate income withholding for child support obligations.

2. Evaluate the cost-effectiveness and efficiency of using a percentage-of-income standard to establish a child support obligation.

3. Establish an advisory committee consisting of representatives of various interested organizations, including but not limited to judicial, legal, labor and business organizations.

(b) The department shall submit a report to the presiding officer of each house of the legislature no later than June 30, 1986, on the cost-effectiveness and efficiency of immediate income withholding for child support obligations in the counties with which the department entered into written agreements before July 1, 1984.

(c) The department may expend $22,500 in fiscal year 1985-86 and $22,500 in fiscal year 1986-87 from the

appropriation under s. 20.435 (4) (de) to pay counties for the costs of processing immediate income withholding, pursuant to agreements entered into under par. (a) 1. The department shall develop a plan for allocating those moneys among counties with which the department enters into agreements.

(d) This subsection does not apply after June 30, 1987, or the effective date of the 1987-89 biennial budget act, whichever is later.